

**Responses of William J. Kayatta, Jr.,
Nominee to be United States Circuit Judge for the First Circuit,
to the Written Questions of Senator Chuck Grassley**

- 1. The ABA Standing Committee on Judiciary requires that all members agree, “not to seek or accept a federal judicial nomination while serving on the Committee and for at least one year thereafter.”¹ In your Senate Questionnaire, you indicate you originally did not apply to the judicial screening committee established on April 8, 2011, due to the above agreement. Please expand upon the information you provided in your questionnaire as to your ultimate decision to meet with the screening committee and eventual nomination. In doing so please address the following questions:**

- a. When did your term on the ABA Standing Committee expire?**

Response: August 6, 2010

- b. When was your last communication with members of the ABA standing committee regarding a judicial nominee?**

Response: In early 2011 (or possibly late 2010) I was one of a large number of lawyers and judges contacted by a member of the ABA’s Standing Committee on the Federal Judiciary (“the Committee”) as part of its peer review soliciting information about a potential district court nominee. I did not know the nominee, hence I provided no information. I was also interviewed by the Committee in early January in connection with its evaluation of me as a nominee. I have otherwise had no communication with the Committee regarding any judicial nominee since my last day as a member of the Committee.

- c. On what basis did Ms. Askew and Mr. Hill determine it was acceptable under the ABA Standing Committee agreement for you to accept an invitation to meet with the screening committee?**

Response: The issue was whether I could meet with the screening committee at its invitation. Ms. Askew, as the most recent former chair during my tenure, and Mr. Hill, as the then current chair, each informed me that accepting such an invitation under the circumstances would be consistent with Committee rules. I understood their reasoning to be that such conduct would not constitute a “seeking” of the nomination within the meaning of the Committee rules. Mr. Hill also advised me that I should make sure that the screening panel understood that I could not and would not apply for the position until after August 7, 2011. A copy of a confirmatory email exchange at the time is attached to these answers. (Ms. Askew’s prior concurrence was conveyed orally.) Mr. Hill’s successor, and the entire Committee that later evaluated me as a nominee, were also informed of the manner in which I proceeded.

¹ ABA Standing Committee on the Federal Judiciary, What It Is and How It Works at p. 2

- i. **Was it their belief that in accepting an invitation you were not violating the agreement because you were not “seeking” a federal judicial nomination? Is there precedent to support this interpretation of the agreement?**

Response: Yes, as explained above, that is my understanding of their reasoning. I am unaware of any precedent on point either way.

- ii. **Did Ms. Askew and Mr. Hill grant you an exception to the ABA agreement? Have similar exceptions been granted in the past?**

Response: I did not regard the permission granted as an exception. Rather, I understood Ms. Askew and Mr. Hill to be saying as former and then current chairs of the Committee that my conduct was in keeping with the letter and purpose of the rule.

- d. **Finally, please supply a copy of the letter you sent to Representatives Pingree and Michaud explaining why you had not applied for the judgeship.**

Response: I have attached an unsigned copy of the original letter as sent, with the exception that I have redacted my home address.

2. **As part of your service on the ABA Standing Committee on the Judiciary, you agreed, “not to participate in, or contribute to, any federal election campaign or engage in any partisan political activity on the federal level.” You indicate in your questionnaire that you attended Cote for Congress and Obama for President organizing meetings until June of 2007. A search of federal campaign donations also indicates you made federal contributions to both of these campaigns in May of 2007.**

- a. **When were you selected to serve on the ABA Standing Committee on the Judiciary and on what date did your term on the ABA Standing Committee actually begin?**

Response: The ABA’s President informed me on July 13, 2007, that he was considering appointing me to the Committee if I would accept. I was notified of my appointment on July 30, 2007. I joined the Committee on August 11, 2007.

- b. **What assurances can you give the Committee that your prior political activities or partisan views will play no part in your role as a judge?**

Response: My view of what a judge does – and my motivation to serve as a judge – are incompatible with any desire to allow such views or activities to form the basis for my decisions. The bipartisan support for my nomination in Maine and elsewhere provides tangible support for this assurance. And the fact that my views and political

activities have never prevented me from performing my role as counsel in advocating for my clients demonstrates that I know how to respect my role and will act with similar respect for the role of a judge.

3. **At your confirmation hearing, I asked you about your views on federal judicial pay. You responded in part by saying, you “continue to believe...that the prolonged reduction in judicial pay that has occurred as a result of the combination of no pay increases and inflation over time is a serious matter for Congress to consider.” The American College of Trial Lawyers report on Judicial Compensation went further by suggesting that due to inflation, current judicial compensation violates the Constitution’s edict that a judge’s pay “shall not be diminished during their time in office.” The report recognizes that the 1977 case of *Atkins v. United States* rejected such an argument. However, in a footnote the report argues, “the effect of inflation on judicial salaries over the past 30 years has eroded judicial compensation as effectively as an all-out assault.”**

- a. **Do you believe the current pay scale for federal judges represents an “all-out assault” on the Judiciary?**

Response: No. I do share the view that, over time, the erosion in real pay could undermine judicial independence for the reasons articulated by Chief Justice Roberts and explained in the report. The report responded to the Chief Justice’s concern that the failure to raise federal judicial pay created a “constitutional crisis that threatens to undermine the strength and independence of our federal judiciary.” *Report* at p. 1. Neither the report nor the American College of Trial Lawyers took a position on whether the diminution in real pay actually violated the Constitution.

- b. **Do you believe the current effect of inflation on the pay for judges, in the words of the *Atkins* court, “works in manner to attack their independence as Judges?”**

Response: I do share the view that substantially reducing real pay for federal judges tends over time to diminish judicial independence just as our Founding Fathers feared and as Chief Justice Roberts has explained.

4. **While you were a member of its board, the American College of Trial Lawyers issued a report concerning judicial elections. I recognize that you did not directly participate in that report, but am curious as to your views. The report takes the view that judicial elections infringe on the independence of the judiciary. One example the report provides is the judicial election in Iowa that resulted in the defeat of three Iowa Supreme Court justices who imposed gay marriage on Iowans.**

- a. **Is it your view that citizens of a State should have no recourse against Judges who overstep their bounds by legislating from the bench?**

Response: No.

- b. Do you believe that judges are subject to “checks and balances” by the other branches of government?**

Response: Yes.

- 5. The report further spoke critically of the Supreme Court’s decision in *Citizens United v. FEC* for “increase[ing] the pernicious influence of money and politics in the election of judges.”**

- a. Many, including the President, have been highly critical of the Supreme Court’s decision. Do you believe *Citizens United* was correctly decided?**

Response: Challenges to current and proposed campaign finance legislation in Maine and the resulting prospect of related litigation in the First Circuit in the near future make it particularly inappropriate for me to announce any personal views on the “correctness” of the Supreme Court’s decision, even assuming I have formed any such considered views. I can certainly say that I would have no hesitancy in following the Supreme Court’s holdings, as my role would require me to do so no matter what my personal views might be.

- b. The President has characterized the Supreme Court’s decision as reversing a “century of law.” Do you believe this is a fair and accurate characterization of the Supreme Court’s decision? Why or why not?**

Response: For the reasons stated above, and other than noting the express reversal of *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), I do not think it appropriate to announce my personal views on any current debate concerning the extent to which the Court’s holding reversed prior law. As a circuit judge, my obligation would be to follow the holding no matter how much prior precedent it reversed.

- 6. At your confirmation hearing, I asked you about your representation of the City of Portland in a Second Amendment case. In response to my question regarding whether you argued the Second Amendment conferred only a collective right you responded in part by saying, “it’s highly likely I would have raised the law as it existed at the time.” Some have criticized the *Heller* decision as creating a right that did not previously exist. Do you believe *Heller* created a previously non-existent right or did the Court recognize a right that previously existed?**

Response: Overruling any prior authority to the contrary, including decisions by the lower federal courts, the Supreme Court in *Heller* for the first time recognized a right that was preserved by the Second Amendment to the Constitution at the time the amendment was ratified.

- 7. Your brief in *Thomas v. City Council of Portland*, generally took the view that the Second Amendment only conferred a collective right. Your brief further argued**

that even if the Second Amendment conferred an individual right, it did not apply to handguns because they are not the “types of weapons that bear a ‘reasonable relationship to the preservation or efficiency of a well-regulated militia’.” Given the Supreme Court rulings in *Heller* and *McDonald*, what is your understanding of the types of weapons protected by the Second Amendment?

Response: *Heller* states that the Second Amendment covers “all instruments that constitute bearable arms.” 128 S.Ct. at 2792. Such instruments include “even those that were not in existence at the time of founding.” *Id.* This right does not apply to “any weapon whatsoever.” *Id.* at 2816. Rather, “the sorts of weapons protected were those ‘in common use at the time’,” and apparently excluding “dangerous and unusual weapons,” not of a type typically “possessed at home.” *Id.* at 2817.

8. What is the most important attribute of a judge, and do you possess it?

Response: Impartiality untainted by hubris or a failure to clearly understand one’s role in our unique and exceptional constitutional democracy. I hope that I possess this attribute as much as one can possess it.

9. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: A good judicial temperament, especially for an appellate judge, includes the modesty and patience required to entertain the competing arguments of the parties and one’s colleagues, and the discipline required to harness one’s skills and learning in an attempt to reach a fair and wise decision grounded in the law and facts. No one meets this standard completely, but I will strive to do so.

10. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: Yes.

11. At times, judges are faced with cases of first impression. If there were no controlling precedent that was dispositive on an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: The fact that precedent provides no clear answer does not mean that a judge looks to his or her own views to decide the case. Absent controlling precedent, one examines the text of the applicable law. Absent an answer in the text, one considers the parties’ briefs, and any analysis offered by colleagues; one reasons by analogy to related

precedent, considering the underlying purposes sought to be furthered by the law; one tests that reasoning by examining where it would lead; and one tempers preliminary conclusions by subjecting them to the rigor of careful writing.

12. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your best judgment of the merits to decide the case?

Response: I would be obligated to follow all Supreme Court precedent unless the precedent is overruled. I would be obligated to follow all prior First Circuit precedent except when sitting with the Court *en banc* or where the precedent has been undercut by subsequent Supreme Court holdings.

13. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: Generally, assuming that jurisdiction exists, federal courts are expected to declare unconstitutional such statutes as are found to exceed Congress's constitutional authority or otherwise violate the Constitution.

14. In your view, is it ever proper for judges to rely on foreign law, or the views of the "world community", in determining the meaning of the Constitution?

Response: It is proper to do so only when required to do so by precedent. For example, the Supreme Court has instructed that consideration of English common law may provide guidance in understanding the meaning of the U.S. Constitution. *See, e.g., United States v. Jones*, 132 S.Ct. 945 (2012). Our laws express the will of the American people, not those of other countries.

15. Under what circumstances, if any, do you believe an appellate court should overturn precedent within the circuit? What factors would you consider in reaching this decision?

Response: Circuit courts may overturn circuit precedent when sitting *en banc* or when the Supreme Court has trumped such precedent. When sitting *en banc* to consider reversing prior precedent, I would consider the benefits of *stare decisis*, and the strength of the arguments tendered for correcting course.

16. Please describe with particularity the process by which these questions were answered.

Response: I received the questions during the evening of March 21, 2012, prepared responses to the questions, reviewed my answers with a representative of the Office of Legal Policy of the Department of Justice on March 23, finalized my draft, and requested that my responses be submitted to the Senate Judiciary Committee.

17. Do these answers reflect your true and personal views?

Response: Yes.